further admits, and as the OTS itself has stated, "federal associations . . . are uniquely federalized institutions" *See* Resp. Br. 20-21; *see also* Pet. 27. FS&L's are federal instrumentalities (*see* Pet. 26-27). Thus, at the outset, this case is *not* one that involves purely "private parties, and 'turns on . . . judgments made by private parties' without 'standards . . . established by the State'"). *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1008 (1982)).

Respondent's contention that the outcome of *Am. Mfrs.* controls here (Resp. Br. 23, 24-5) is mistaken. Here, "'the specific conduct of which the plaintiff complains,'" *Am. Mfrs.*, 526 U.S. at 51 (quoting *Blum*, 457 U.S. at 1004), is Respondent's failure to pay the escrow interest *required under New York law*. What previously may have been a private choice is now a "public" obligation. Unlike *Am. Mfrs.*, *id.* at 52, the OTS was "directly involved" in Respondent's failure to pay the required interest; Respondent affirmatively relies on the OTS preemption regulations and opinion letters going back to 1984 (Resp. Br. 12 n.8) - and Respondent even requested the OTS to issue an opinion letter *in this case* (*see* Pet. 25). Unlike the limited Bureau participation in *Am. Mfrs.*, *id.* at 54-55, the OTS involvement is "pervasive and substantial," and coercively eliminates Petitioners' property right in the escrow interest otherwise guaranteed under state law. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 635-36 (1991) (Connor, J. dissenting).

According to the other principal "state action" authority cited by Respondent (Resp. Br. 23-24), *Andrews v. Fed. Home Loan Bank of Atlanta*, 998 F.2d 214, 217 (4th Cir. 1993), "conduct is fairly attributable to the state" "when the state has committed an unconstitutional act in the course of enforcing a right of a private citizen." Assuming *arguendo* Respondent could be considered a "private citizen," then the test is satisfied by the taking of Petitioners' property and giving Petitioners' interest to Respondent in order to enforce the "right" of Respondent not to pay what is otherwise mandated by the State. The direct transfer of private property to another private party without just compensation is presumptively

unconstitutional. *See Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984).

This case presents a Fifth Amendment taking and "state action" issue worthy of review.

III. Review Is Warranted Because Of The Importance Of This Case

The Court should reject Respondent's attempt to minimize the importance of this case (Resp. Br. 25-26). Disregard by the Executive Branch for the intent of the Framers and Congress, and for fundamental principles of federalism, is a violation of the democratic compact between the government of this Nation and its people. Whether the specific number of potentially affected mortgage borrowers is in the hundreds of thousands or millions, and whether the specific amount of escrow interest at stake totals in the hundreds of millions or billions of dollars *each year*, the importance of this case to mortgage borrowers in the United States and its territories is vast.

CONCLUSION

For all of the reasons herein and in the Petition, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

WILLIAM R. WEINSTEIN
Counsel of Record
ROBERT I. HARWOOD
WECHSLER HARWOOD LLP
488 Madison Avenue, 8th Floor
New York, NY 10022
(212) 935-7400

MICHAEL KATZ
RABUNSKI & KATZ, LLP
630 Third Avenue, 23rd Floor
New York, NY 10017
(212) 682-6260

Attorneys for Petitioners